Nos. 731 and 732

In the Supreme Court of the United States

OCTOBER TERM, 1946

ROY BARTELS, ED BARTELS, CARL BARTELS AND JUSTIN CONLON, d/b/a CRYSTAL BALLROOM, PETITIONERS

v.

E. H. BIRMINGHAM, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE STATE OF IOWA, AND GRIFF WILLIAMS, BILL CARLSEN, TINY HILL, BOYD RAEBURN, BUDDY FISHER, AND PAUL MOORHEAD, INTERVENERS

LARRY V. GEER AND MARGARET GEER, d/b/a LARRY GEER BALLROOMS, PETITIONERS

v.

E. H. BIRMINGHAM, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE STATE OF IOWA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the District Court (R. 654–664) is reported in 59 F. Supp. 84. The opinion of the

Circuit Court of Appeals (R. 682–708) is reported in 157 F. (2d) 305.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on September 25, 1946 (R. 709–711). The petition for writs of certiorari was filed on November 29, 1946, and granted on January 6, 1947 (R. 714). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether musicians and their leaders who performed at the petitioners' ballrooms were employees of the petitioners within the meaning of Sections 1426 (b) and 1607 (c) of the Internal Revenue Code, which define employment for social security tax purposes.

STATUTES AND REGULATIONS INVOLVED

The applicable statutes and regulations are set forth in the Appendix, *infra*, pp. 23–25.

STATEMENT

These actions were brought in the United States District Court for the Southern District of Iowa by petitioners for recovery of social security taxes with respect to the services of eleven orchestras which furnished music for public dances held at petitioners' ballrooms during the year 1940, 1941 and 1942. The cases were consolidated for

trial in the District Court (R. 654) and for hearing in the Circuit Court of Appeals for the Eighth Circuit (R. 675).

The orchestras were known as "name bands" which traveled together as a group and performed at hotels, college proms, ballrooms and over the radio (R. 71, 162–163, 259). Each orchestra functioned under a leader, who formed the group and attempted to develop a reputation which was based upon a distinctive style of play and on showmanship (R. 131–132, 162–163). The bands were advertised under the name of the leader as, for example, "Griff Williams and His Orchestra" (R. 260, 404–433). The leaders rehearsed the music, directed the seating arrangements, commenced and regulated the flow of music by means of a baton or other suitable signal, arranged instrumentations, and supervised the quality of music as it was being played (R. 55–56, 58, 272–275). Booking agencies were used to solicit engagements for the orchestras (R. 52). The engagements involved in this action were either for one night or at most for several intermittent nights (R. 50–51). The musicians furnished their own uniforms and instruments except the piano which the petitioners supplied (R. 54–55).

The leader hired and fired the other musicians (known as "sidemen") and determined their compensation, which was never less, but might be more, than the Union scale (R. 136, 258). The

leader paid the sidemen out of the sum received for the engagement from the petitioners and other ballroom operators. The leaders also paid transportation, agents' commissions, and other expenses out of this sum. (R. 135–136, 167–168.) Any excess remaining was retained by the leader as profit; if there was a deficit the loss was borne by the leader (R. 137–138, 168).

The ballroom owner (hereinafter referred to as "owner") would provide the place for the performance. The time was specified in the contract. (R. 141, 145, 177, 267, 307, 311.) There was evidence, which was disputed, that the owner would on occasion suggest that certain types of music be played, and that he specified the time of the intermission (R. 625, 315, 320).

On such facts the Commissioner of Internal Revenue had ruled and the courts had held, that the leaders were the employers. *Williams* v. *United States*, 126 F. (2d) 129 (C. C. A. 7), certiorari denied, 317 U. S. 655; cf. *Spillson* v. *Smith*, 147 F. (2d) 727 (C. C. A. 7). While this litigation was going on, the American Federation of Musicians undertook to devise a contract which would make the owners the employers of the musicians, in order to assure that the owners would be treated as employers for Social Security purposes. The contract adopted, known as the "Form B" contract, reads as follows (R. 12–14, 83, 141, 307, 311):

This Contract for the personal services of musicians, made this 26th day of July, 1941 between the undersigned employer (hereinafter called the employer) and 13 musicians (including leader) (hereinafter called employees) represented by the undersigned representative.

Witnesseth, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of Griff Williams, according to the following terms and conditions:

Place of employment: Crystal Ballroom, Dubuque, Iowa.

Date(s) of employment: September 1, 1941.

Hours of employment: 9 P M to 1 A M.

Price agreed upon: $350 Guarantee with A 60% Privilege Of Gross Receipts (Terms and Amount). (Rec'd $125.00 7/31 M. E.)

To be paid $125 Deposit, Balance by 11 P M Night Of Engagement (Specify when payments are to be made).

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied

to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction

the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer: Crystal Ballroom
By Roy Bartels
Street Address: 1545 Auburn St.
City or State: Dubuque, Iowa
Phone ----------

Accepted by Employer Roy Bartels
Accepted ----------
(Orchestra leader)

By (S) JAMES BREYLEY,
MUSIC CORPORATION
OF AMERICA,
Representatives of Employees.

Form B

734086—47——2

On April 12, 1941, the Commissioner of Internal Revenue advised an orchestra (R. 511–513) that:

> In view of the express terms of the contract it is clear that the Corporation has the right to exercise over Mr. Heatherton and the other members of the orchestra the direction and control prescribed by the applicable regulations as being necessary to establish the relationship of employer and employee. Whether or not such right is actually exercised is immaterial so long as the right exists. It is, therefore, held that Mr. Heatherton and the other members of the orchestra are employees of the Stevens Hotel Corporation for purposes of the taxes in question.

On May 1, 1941, James C. Petrillo, President of the American Federation of Musicians, ordered all members of the Federation to use only the "Form B" contract (R. 14–15, 587).[1] The contract has been used in all engagements through-

[1] The contract provided that "all the rules, laws and regulations of the American Federation of Musicians * * * are made part of this contract" (R. 13). Many of these laws clearly indicated that the members were to be employed only by leader-members, and not by outsiders. See references in petitioners' brief, pp. 75–76. The Constitution of the Federation also provided that the President may by order "annul and set aside" "the Constitution, By-Laws", etc., "and substitute therefor other and different provisions of his own making" (R. 608). The Federation construed the President's order of May 1, 1941, as superseding all prior inconsistent provisions of the By-Laws or Constitution. But even apart from this, on ordinary principles of contract interpretation, assuming that the "Form B" contract and the

out the country since that time. Petitioners objected to entering into contracts in this form, but did so because they could not otherwise obtain any bands to play in their establishments (R. 109–111, 663).

The subsequently established record in these cases showed that in actual practice the business was conducted no differently than it had been before the advent of the "Form B" contract (R. 663, 139, 253, 277, 327, 365, 393, 397), although there was testimony that the leaders would have obeyed requests from the owners if any had been made (R. 393, 386–7, 558–9, 626–7).

The District Court found that the contract did not represent the true relationship of the parties; that it was not entered into by fair negotiations; and that the right of control as well as the actual control was intended to be retained and was retained by the leaders (R. 662–663). The court stated in its opinion that the orchestras, as independent organizations for hire, were inherently incapable of being controlled by the petitioners (R. 662). Accordingly, the court concluded that the leaders were independent contractors and that they, rather than the ballroom owners, were the employers of the musicians or sidemen (R. 665). The Circuit Court of Appeals reversed the judg-

By-Laws of the Federation should be treated as inconsistent provisions of the same contract, it would appear that the later and more specific provision of the Form would be controlling.

ments and remanded the cases to the District Court (R. 709–711).

SUMMARY OF ARGUMENT

As against the Government we do not believe that a contract reciting that a particular person is the employer and giving him the right of control is binding as a matter of law so as to preclude consideration of other factors. It is important that skill in the draftsmanship of legal papers bearing little or no relationship to the actual management of the affairs which they purport to describe should not allow parties to circumvent legislative enactments.

In these cases, however, the petitioners entered into these contracts with their eyes open, albeit unwillingly, and they are not in a position to insist that the Treasury disregard the contracts into which they have entered. Although the Government has the right to look through the form of a contract or other document to the substance of an arrangement, the parties who have voluntarily entered into the arrangement cannot *require* the Government to do so.

ARGUMENT

The Government is more concerned in this case with the establishment of correct principles of law than with whether the sidemen are employees of the ballroom owners or the leaders. In either event the sidemen are accorded Social Security protection.

A. THE PROBLEM IN RELATION TO ACCOMPLISHMENT OF THE PURPOSES OF THE STATUTE

In the brief for the United States in *United States* v. *Silk*, No. 312, the Government has argued that in determining whether persons are employees it is important that the purpose of the statute to give Social Security protection to those who are in need of it should be a guiding principle. This may also be true with respect to the determination as to which of several persons is an employer of workers who are undoubtedly employees of someone. Workers may be deprived of effective Social Security protection, or the Government of the funds upon which the Social Security system rests, if a factory or mine operator, for example, is permitted to establish a plan whereby the work is technically contracted out to workmen, or some of them, as nominal independent contractors. In such cases workers or the Treasury might be deprived of their rights under the Act, both because the subdivision of the employment might result in units smaller than the eight-man minimum subject to the Unemployment Compensation portion of the Social Security scheme, and because the Treasury would have to look to workers who normally keep inadequate records and have few financial resources, rather than to the financially responsible management, for its revenues. In such situations the skill of lawyers in drafting an air-tight contract trans-

ferring—at least on paper—the control and other features of the employment relationship to supervisory or other workers should not enable the true employer to circumvent the statutory purpose. E. g., *Walling* v. *Rutherford Food Corp.*, 156 F. (2d) 513 (C. C. A. 10), pending on writ of certiorari, No. 562.

In the instant cases we do not get much help by referring to the basic statutory objectives. For whoever is the employer—and certainly despite the contention to the contrary in *Nebraska National Hotel Co.* v. *O'Malley*, No. 941, certiorari denied March 3, 1947, either the leader or the owner is the employer—the sidemen are accorded Social Security protection. And it is the sidemen, rather than the leaders of these name bands, who are dependent on another's business enterprise for their livelihood and work. Nor can it be said that the Treasury has any particular choice as between the leaders or the owners insofar as tax collection is concerned; each is normally sufficiently responsible. Even though this may not always be the case as to particular individuals, it can not be assumed that this is more true of one group than the other.

The substantive differences insofar as coverage is concerned are that: (1) The leader is covered if the owner is the employer; and (2) a band may be exempt from unemployment compensation coverage if the number of employees would be less than eight if the leader is excluded, and if the

musicians plus other employees of the owner would total more than eight.[2] Although these matters will be of importance to individuals, the Government does not believe that they are entitled to much, if any, weight in determining who should be treated as the employer. For, apart from the contract to be considered, the leaders of the name bands in the cases before the court certainly have the normal attributes of the entrepreneur, and the circumstance that particular bands may include less than eight members does not in this industry manifest an attempt to establish a formal but artificial employer relationship.

It may be observed that such musicians may not be typical of musicians generally. Bands led by a musician of prominence playing short stands in different establishments are much more likely to be independent of the owner of the establishment, from the viewpoint both of economic and physical control and integration in his business, than bands attached to the establishment for a considerable period of time or in which the leader has no real independent organization of his own. Bands of the latter type should probably be treated as employees of the owner of the establishment irrespective of the decision in these cases.

[2] It is also true that particular engagements for exempt charitable, educational, or governmental organizations will not be covered if the owner rather than the leader is the employer. This factor, however, is not of great significance.

In the absence of guidance from the statutory objectives, we turn to the criteria by which the employment relationship is customarily tested.

B. THE CONTRACT IS NOT CONCLUSIVE UPON THE GOVERNMENT

At common law the same factors are customarily referred to in determining the identity of the employer as in determining whether any employment relationship exists at all. See Restatement of Agency, Section 220. The factor most stressed and sometimes regarded as basic, with the others only evidentiary, is the right to control the employee's work.

Insofar as name band musicians are concerned, before the establishment of the Form B contract the Commissioner had ruled and the court held in the *Griff Williams* case, *supra*, that the sidemen were subject to the control of the leaders and that the leaders were the employers. (See p. 4, *supra*.) The court below, while accepting those decisions, thought that the Form B contract shifted the right of control to the owners and in and of itself made them the employers. It is also suggested that in any event the Commissioner was not required to look through the contract at the instance of one of the parties to it. As will appear we are in accord with the second suggestion but not as to the court's view of the conclusive nature of the contract.

The Form B contract describes the ballroom owner as the employer and all musicians and leaders as his employees. The court below did not, however, rely on these recitals as to status but on the provision that "the employer shall at all times have complete control of the services which the employees will render under the specifications of this contract." This provision, the court held, gave the owner the right to control the musicians' services whether he exercised it or not, and that unless the contract was abrogated or modified by subsequent conduct manifesting an inconsistent intention, this made the owner the employer.

We agree that significance attaches to the right of control and not merely to control actually exercised. But we do not regard that factor as all-conclusive when other factors point toward a different employer, particularly when it appears that actual control is in almost every important respect exercised by someone else.

If we assume, however, that the right to control alone need be considered and that the contract gives that right to the owner, we still would not treat the contract as decisive when evidence as to conduct shows that in fact the contract does not conform to the relationship actually existing. In this field, as in others, it is important that parties not evade their obligations by the use of legal documents which on their face do, but in fact do not, change the substance of a relationship.

Cf. *Commissioner* v. *Tower*, 327 U. S. 280; *Commissioner* v. *Court Holding Co.*, 324 U. S. 331; *Helvering* v. *Clifford*, 309 U. S. 331; *Gregory* v. *Helvering*, 293 U. S. 465.

As between the parties it may be true as a matter of contract law that the contractual provision is binding unless abrogated by mutual understanding. The test is not the same for an outsider like the Government. Even if the parties intend not to abrogate the contract, the Government is not bound by it if it does not describe the actual relationship. That is not to say that the contract is immaterial, that it is not an important factor in determining employment. We contend only that it is not in and of itself decisive when all other evidence points in a contrary direction.

As we have pointed out, the court below conceded this to be true as to recitals in a contract, but not as to promises or covenants, which in themselves establish obligations. The court's view was that if the parties agree that one of them has the right to control the other, he has it, and that since this is a matter upon which they can agree, nothing more need be considered. We agree that as between the parties the covenant may be binding, and that a covenant is entitled to more respect than a mere recital of status. But to attribute absolute binding force to such covenants would still permit the circumvention of legislative enactments through mere skill in

drafting legal papers which bear little or no relationship to the actual management of the affairs they purport to describe. If attorneys were advised that although declaratory or descriptive recitals were insufficient, agreements that a particular person had or had not the right of control would avail, they would find little difficulty in adapting their writings to the latter rule.

It is, of course, simpler to refute a covenant denying the right to control than one granting it. For the actual exercise of control by the person to whom it is denied by the contract would show that he had control in fact. The failure to exercise control by one granted the right by contract does not prove that he does not have it. A latent power to control may in itself be sufficient to subject a worker to an employer's dominance. Nevertheless, we think that circumstances may refute a contractual grant of control if it is shown that in fact not only is actual control exercised by another but that the nature of the enterprise is such as to make it reasonably plain that everyone knows that it must be.

C. THE GOVERNMENT IS ENTITLED TO RELY ON THE CONTRACT

Our conclusion is that when a contractual provision such as is here involved is inconsistent with the parties' conduct, the Government is not bound by it when it is used as a means of evading a statutory obligation.

But in these cases the situation is peculiar. The device here employed does not decrease the revenues. It was intended not to escape or reduce taxes but to transfer the liability in a manner which would normally increase the tax payment and expand the statutory coverage (through the inclusion of the leader and bands smaller than eight in number). The contract may be regarded as no more than a lawful transfer of the tax, binding as between private parties without harming the Government in any way.

The contract was entered into by the parties, including the petitioners, with full knowledge of its provisions. Months before the engagements involved in these cases the Commissioner had ruled that the Form B contract on its face made the ballroom owner liable for Social Security taxes (R. 511, *supra*, p. 8). The American Federation of Musicians had given wide publicity to this ruling, and had made no secret of the fact that the purpose of the contract was to make the owners the employers for Social Security purposes (R. 583–585). Although the petitioners signed these contracts unwillingly, they did so with their eyes open. There was no more duress than in the case of an employee who must accept a particular job in order to support his family; his need does not make the contract illegal. The same must be true

when the employer has the inferior bargaining position.[3]

The owners would thus not seem to be in a position to insist that the Treasury disregard the contracts into which they have entered.

In a situation of this sort, as the court below stated (R. 695): "The right to make the choice * * * is the Commissioner's." This Court has held on several occasions that although "the Government may not be required to acquiesce in the taxpayer's election of that form for doing business which is most advantageous to him," a "taxpayer is free to adopt such organization for his affairs as he may choose and having elected to do some business as a corporation, he must accept the tax disadvantages." *Higgins* v. *Smith*, 308 U. S. 473, 477. In *Moline Properties, Inc.* v. *Commissioner*, 319 U. S. 436, 439, the Court cited approvingly *Burnet* v. *Commonwealth Improvement Co.*, 287 U. S. 415, as holding that "the choice of the advantages of incorporation to do business * * * required the acceptance of the tax disadvantages." See also to the same effect, *Schenley Corp.* v. *United*

[3] In *Moline Properties* v. *Commissioner*, 319 U. S. 436, 440, the Court stated "The argument is made by petitioner that the force of the rule requiring its separate treatment is avoided by the fact that Thompson was coerced into created petitioner and was completely subservient to the creditors. But this merely serves to emphasize petitioner's separate existence."

States, 326 U. S. 432, 437; *Interstate Transit Lines* v. *Commissioner*, 319 U. S. 590; *Edwards* v. *Chile Copper Co.*, 270 U. S. 452, 456; *New Colonial Ice Co.* v. *Helvering*, 292 U. S. 435.[4]

The rule that the Government is not compelled to look through an arrangement into which the parties have entered is not limited to cases involving corporate entities. In *Gray* v. *Powell*, 314 U. S. 402, the Court said with reference to an independent contractor relationship (p. 414):

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[4] *Helvering* v. *Tex-Penn Co.*, 300 U. S. 481, relied upon by petitioners, was concerned with whether a certain payment to a liquidating corporation was consideration for its assets or money furnished by the corporation's individual owners to pay its expenses. Certain documents recited that it was consideration; others indicated that it was not, and the latter were supported by the oral testimony. It was in this connection that the Court, in refusing to be bound by the statements in the former documents, made the remarks quoted by respondent. The prefacing sentence to the statement of the circuit court of appeals in that case (quoted in this Court's opinion, 300 U. S. at 492–493) that "taxing authorities must look through form to fact and substance" was that "a consideration of all the documentary evidence drives us to the conclusion that the $350,000 was not consideration." The opinions do not suggest that the documents supporting the position that the payment was made as consideration were entitled to greater respect than the others. The case thus does not involve the effect to be given a single contract uncontradicted by other documents, which on its face bears a definite meaning. The rule of the cases cited in the text that parties to such contracts cannot force the Government to treat them as sham would obviously not preclude courts from interpreting a confusing group of inconsistent papers such as was involved in the *Tex-Penn* case. The *Tex-Penn* case thus does not deal with the problem we have here, and is not inconsistent with the other authorities.

"The choice of disregarding a deliberately chosen arrangement for conducting business affairs does not lie with the creator of the plan. *Higgins* v. *Smith*, 308 U. S. 473, 477." In *Helvering* v. *Coleman-Gilbert Associates*, 296 U. S. 369, 374, the Court stated with respect to a trust: "The parties are not at liberty to say that their purpose was other or narrower than that which they formally set forth in the instrument under which their activities were conducted."

We are not, of course, contending for any general right of the Government to choose between possible taxpayers irrespective of circumstances. Our suggestion is limited to the situation in which a person knowingly and for his own reasons enters into a contractual arrangement which will subject him to taxation or regulation. When he does that he should not be able to require the Government to disregard the obligation he has undertaken.

The reasons why the Treasury has ruled that the Form B contract is controlling are not difficult to perceive. The Treasury regulation on this subject has long stressed the right of control. See pp. 23–25, *infra*. Here the contract expressly vested that right in the owner. The Treasury ruling was based on the contract. The ruling on its face shows that it rests only on the facts submitted to the Treasury. The Treasury did not have before it facts showing, and was not required to assume, that the changed status established in the contract would not be reflected in actual operations.

As we have indicated, *supra*, pp. 10–13, the Treasury's interest in which of the two potential employers here pays the taxes is not vital. The primary advantage to the Treasury in relying on the contract is its definiteness. If the Treasury can stand on the contract, which is presently employed by all musicians throughout the country, it avoids the necessity of having to litigate each of the manifold fact situations which will otherwise inevitably be presented, depending upon how much control the ballroom or hotel or club owner actually exercises. There is thus an advantage to the Commissioner in not being *required* to look through the general contract to the facts of each case in order to decide whether the contract fully describes the relationship. We submit that the petitioners cannot force him to do so, and that, for this reason, the judgment below should be affirmed.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.
SEWALL KEY,
Acting Assistant Attorney General.
ROBERT L. STERN,
LYLE M. TURNER,
Special Assistants to the Attorney General.

MARCH 1947.

APPENDIX

Internal Revenue Code:

> SEC. 1426 [as amended by Section 606 of the Social Security Act Amendments of 1939, c. 666, 53 Stat. 1360]. DEFINITIONS.
>
> * * * * *
>
> (b) *Employment.*—The term "employment" means, * * * any service, of whatever nature, performed * * * by an employee for the person employing him. * * *
>
> * * * * *
>
> (26 U. S. C. 1940 ed., Sec. 1426.)

The definition of employment in Section 1607 (c), Internal Revenue Code, as amended by Section 614 of the Social Security Act Amendments of 1939 is identical.

Treasury Regulations 106, pertaining to the Federal Insurance Contributions Act:

> SEC. 402.204. *Who are employees.*—Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.
>
> Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done.

In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee.

Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, co-adventurer, agent, or independent contractor.

The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

No distinction is made between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees. An officer of a corporation is an employee of the corporation but a director as such is not. A director may be an employee of the corporation, however, if he performs services for the corporation other than those required by attendance at and participation in meetings of the board of directors.

Although an individual may be an employee under this section, his services may be of such a nature, or performed under such circumstances, as not to constitute employment within the meaning of the Act * * *.

Treasury Regulations 107, Section 403.204, pertaining to the Federal Unemployment Tax Act, are identical.

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